IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, a corporation, and AMERICAN HOME ASSURANCE COMPANY, a corporation,

Plaintiffs,

v.

ELECTRIC TRANSIT INCORPORATED, an Ohio corporation and joint venture of SKODA, a.s., a corporation, SKODA, a.s., SKODA OSTROV, s.r.o., a corporation, AAI CORPORATION, a corporation, and CZECH EXPORT BANK, a corporation,

Defendants.
_____/

No. C 04-03435 JSW

ORDER GRANTING MOTION FOR RECONSIDERATION; GRANTING MOTION TO AMEND ANSWER; AND DENYING MOTION TO AMEND EXPERT REPORT

Now before the Court is the motion for reconsideration filed by Plaintiffs and Counterclaim Defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania and American Home Assurance Company, and Third-Party Defendant, American International Group, Inc. (collectively "AIG"). The Court has received Defendant AAI Corporation ("AAI")'s opposition and AIG's reply.[1] Also before the Court is AIG's motion to amend its answer and AIG's motion to amend an expert report. The Court finds that these matters are appropriate for disposition without oral argument and are hereby deemed submitted. *See* Civ.

[1] The Court GRANTS AAI's motion to strike the over-sized reply brief as failing to comply with the Court's page requirements set out in its order granting AIG's motion for leave to file a motion for reconsideration. The Court has only reviewed AIG's 10-page reply submission.

L.R. 7-1(b). Accordingly, the hearing set for November 16, 2007 is HEREBY VACATED. Having carefully considered the motions and the relevant legal authority, the Court hereby GRANTS AIG's motion for reconsideration, GRANTS AIG's motion to amend its answer and DENIES AIG's motion to amend the expert report of Sydney Firestone.

A. Motion for Reconsideration.

A motion for reconsideration may be made on one of three grounds: (1) a material difference in fact or law exists from that which was presented to the Court, which, in the exercise of reasonable diligence, the party applying for reconsideration did not know at the time of the order; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments presented before entry of the order. Civ. L.R. 7-9(b)(1)-(3). In addition, the moving party may not reargue any written or oral argument previously asserted to the Court. Civ. L.R. 7-9(c).

On August 1, 2007, this Court granted AIG leave to file a motion for reconsideration. AIG moves for reconsideration for the Court to consider dispositive legal arguments that it alleges the Court failed to consider initially with regard to its opposition to AAI's motion to strike. In particular, AIG contends that the Court's June 4, 2007 Order granting AAI's motion to strike was overbroad.

On March 7, 2007, this Court issued an order denying AIG's motion for summary judgment in which AIG had asserted that AAI, because of its status as an insider, did not have standing to sue on the subject bond. Subsequently, AAI moved to strike portions of AIG's claims and defenses on the ground that the initial order ruled out such claims and defenses. However, AAI's motion not only requested that the Court dismiss those insider defenses which the Court's March 7 Order held to be unavailable to AIG, but also sought to strike other claims and defenses.

On June 4, 2007, this Court granted AAI's motion to strike in its entirety. The motion sought to dismiss all of AIG's claims and defenses that mentioned the AAI's insider status. However, the Court's March 7 Order clearly denied summary judgment to AIG on the grounds that the defense that AAI was an insider and therefore not entitled to collect on the bond was

unavailable to AIG. The March 7 Order was not intended to adjudicate AIG's other claims and defenses that did not depend on AAI's legal status as an alleged insider for the purpose of determining standing to make a claim.

The June 4 Order properly dismissed Count I and the second, twelfth and thirteenth affirmative defenses. However, the Court finds, upon reconsideration, that the June 4 Order improperly dismissed Court II, Count II, paragraphs 4 and 5 of the prayer, and the Answer's third, fourth, seventh, eighth, ninth, eleventh, fourteenth and thirty-first affirmative defenses. AIG's motion for reconsideration is GRANTED and those claims and defenses are reinstated.

B. Motion to Amend Answer.

Federal Rule of Civil Procedure 15(a) allows a plaintiff to amend their complaint, after a responsive pleading has been served, by leave of court or by consent of the adverse party. Rule 15(a) provides that leave to amend "shall be freely given." *See* Fed. R. Civ. Proc. 15(a). The Ninth Circuit has stated that "[r]ule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Four factors are considered to determine whether a motion for leave to amend should be granted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). These factors are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment. *Id*. While these "factors are usually used as criteria to determine the propriety of a motion for leave to amend ... the crucial factor is the resulting prejudice to the opposing party." *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

The Court finds that there is no evidence of bad faith in bringing the proposed amendment. In order for a court to find that a moving party filed for leave to amend in bad faith, the adverse party must offer evidence that shows "wrongful motive" on the part of the moving party. *See DCD Programs*, 833 F.2d at 187.

Second, while undue delay is a factor for denying leave to amend, "[u]ndue delay by itself is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999). A moving party may be precluded from asserting an amendment on the basis of undue delay where the matters asserted in the amendment were known to them from the

beginning of the suit. *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971) (finding that where the moving party filed a motion to amend the pleadings 31 months after the answer was filed, the trial court did not abuse its discretion in denying leave to amend). Although the motion to amend the answer comes late in the course of this litigation, the Court does not find that the delay is undue or is sufficient to merit denying leave to amend.

Next, AAI argues that the delay in moving to amend has caused it prejudice. The Ninth Circuit has held that undue delay may result in prejudice when a motion for leave to amend is made on the eve of the discovery deadline, which would have required reopening discovery, or when an amendment is asserted at a late stage of the action and would inevitably lead to a delay in the trial and further expense to the opposing party. *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (citations omitted); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1998) (where plaintiffs waited more than 6 months after the original complaint was filed and until after the original trial date had been vacated to attempt to amend the complaint, delay was undue, and leave to amend was properly denied). An adverse party may also suffer prejudice by undue delay when the moving party asserts a totally new and unrelated claim, which is filed at a late stage of the proceeding. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (undue delay was prejudicial where new claims set forth in the amended complaint would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense). Here, the submissions of portions of the record indicate that AIG's new defense was basically known by all parties and further, that there has been adequate discovery on the issue. Accordingly, the Court finds AAI will suffer no prejudice if the Court grants AIG leave to amend, and this factor weighs in favor of granting the motion.

Lastly, AAI argues that the proposed amendment is futile, based on its contentions that the Court has eliminated the "insider" defense from this case. Leave to amend is properly denied where the amendment would be futile. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). The Court does not find that the defense is an essential part of the

proposed amendment adding an estoppel defense. Accordingly, the motion to amend the answer is GRANTED. AIG may file its amended answer.

C. Motion to Amend Expert Report.

AIG moves to be allowed to amend the expert report of Sydney Firestone to provide expert analysis on AIG's defenses that were not dismissed by the Court's ruling on March 7, 2007.

Rule 26 requires parties to disclose the identity of their expert witnesses "accompanied by a written report prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). Parties are required to serve their opening and expert rebuttal reports "at the times and in the sequence directed by the court." Fed. R. Civ. Proc. 26(a)(2)(C). "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed."[2] *Yetti by Molly Ltd v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This rule excludes untimely expert witness testimony, unless the "parties' failure to disclose the required information is substantially justified or harmless." *Id.*; *see also Carson Harbor Village, Ltd. v. Unocal Corp.*, 2003 WL 22038700, *2 (C.D. Cal. 2003) ("Excluding expert evidence as a sanction for failure to disclose expert witnesses in a timely fashion is automatic and mandatory unless the party can show the violation is either justified or harmless.") (internal quotes and citation omitted). AIG bears the burden of demonstrating its failure was either substantially justified or harmless. *See Yetti by Molly*, 259 F.3d at 1107.

1. Substantial Justification.

A failure to disclose testimony is not substantially justified, where, as here, the need for such testimony could reasonably have been anticipated. *See Wong v. Regents of the Univ. of Calif.*, 410 F.3d 1052, 1061-62 (9th Cir. 2005). The Court's deadline to serve opening expert reports was March 20, 2007 (or ninety days prior to the previously set trial date of June 18, 2007). According to AIG's own motion, the defenses it wishes Ms. Firestone to opine upon

[2] Rule 37 provides in pertinent part: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. Proc. 37(c)(1).

were known at the time of the original disclosure of the report. AIG merely claims that it sought to streamline the issues for the parties and the Court by focusing the expert report on what AIG believed in good faith would be the most straightforward and dispositive analysis. However, the apparent miscalculation of AIG's expert's focus is not substantial justification for the late amendment. Accordingly, the Court finds that AIG's late request to amend the Firestone Report is not substantially justified.

2. Harmlessness.

AIG fails to demonstrate that its failure to prepare the Report by the original deadline was harmless. The dates set for pretrial and trial have been reset twice as a result of last-minute filings by both parties. Moreover, the Court would need to delay both the pretrial conference and the trial again to allow Defendants to rebut the new report and perhaps take further discovery. Disruption of the schedule of the Court and of Defendants "is not harmless." *See Wong v. Regents of the Univ. of Calif.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (finding untimely disclosure of expert witness was not harmless, "even though the ultimate trial date was still some months away" where the deadlines for completing discovery and for filing motions for summary judgment had expired); *see also Carson Harbor Village, Ltd. v. Unocal Corp.*, 2003 WL 22038700, *3 (C.D. Cal. 2003) (finding submission of untimely expert evidence would substantially prejudice defendants because they would have incurred significant expenses in deposing the proffered expert and in preparing an appropriate expert rebuttal and would have suffered from prolonged proceedings if it were allowed). The Court thus finds allowing amendment of the Firestone Report at this stage in the litigation would not be harmless to Defendants.

Accordingly, AIG's motion to amend the Firestone Report is DENIED.

CONCLUSION

For the foregoing reasons, the Court GRANTS AIG's motion for reconsideration, GRANTS AIG's motion for leave to file an amended answer, and DENIES AIG's motion to allow amendment of its expert's report.

The parties were set for a case management conference to follow the hearing set on these matters on November 16, 2007 at 9:00 a.m. As the hearing has been vacated and the parties failed to submit a joint case management conference statement, the Court RESETS the case management conference for November 30, 2007 at 1:30 p.m. The parties shall file a joint submission no later than November 26, 2007, which details the parties' preferred dates for pretrial and trial.

IT IS SO ORDERED.

Dated: November 14, 2007

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE